SUN OIL CO.

IBLA 79-381 Decided August 23, 1979

Appeal from decision of the Director, U.S. Geological Survey, requiring unitization for oil and gas lease OCS-G 2087 with oil and gas lease OCS-G 2088.

Case remanded; stay ordered.

1. Administrative Procedure: Generally -- Geological Survey -- Rules of Practice: Appeals: Effect of

   Generally the Geological Survey may reconsider and modify or revoke its own decision in the absence of an appeal to the Board of Land Appeals. However, the filing of an appeal to the Board removes the matter from the jurisdiction of Survey pending disposition of the appeal.

2. Administrative Procedure: Generally -- Geological Survey -- Oil and Gas Leases: Unit and Cooperative Agreements -- Outer Continental Shelf Lands Act: Unit Plans -- Rules of Practice: Appeals: Effect of

   Where Geological Survey and one of two parties to a compulsory unitization of two outer continental shelf oil and gas leases request a remand of a Survey decision for further consideration, and certain issues raised on appeal would appropriately be better first considered by Survey, the case will be remanded to Survey. In the circumstances, a request to stay implementation of Survey's prior decision may be granted by the Board unless and until Survey acts upon the request when it reconsiders the case.

APPEARANCES: Theodore L. Garrett, Esq., and William P. Skinner, Esq., Covington & Burling, Washington, D.C., for Sun Oil Company, appellant; Joseph C. Bell, Esq., and Ernest B. Abbott, Esq., Hogan & Hartson, Washington, D.C., for Shell Oil Company; Douglas B. Fant, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the U.S. Geological Survey.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Notice of appeal has been filed by Sun Oil Company (Sun), lessee-operator under oil and gas lease OCS-G 2087, in its own behalf and in behalf of other owners of interests in the lease, from a decision of the Director, U.S. Geological Survey (Survey), dated February 7, 1979. That decision affirmed orders of the Conservation Division, Survey, requiring unitization of the oil and gas lease with OCS-G 2088 for which Shell Oil Company (Shell) is the operating lessee and further requiring appellant to subscribe to a certain unit agreement. Contemporaneously with the notice of appeal, Sun filed a motion for reconsideration of the Director's decision. Sun has made a further motion for extension of time to file its statement of reasons for appeal until the Director, Survey, has acted on the motion for reconsideration.

Counsel for Shell has entered an appearance in this case as an adverse party. Shell has filed with the Director, Survey, a motion to supplement the decision, although subsequent filings by Shell to the Board offer Shell's view that the Director's decision provides an adequate basis for affirmance by the Board. In addition, Shell has filed a motion to have the Director, Survey, dissolve the stay of the unitization orders of the Conservation Division, which stay was previously granted by the Director on May 10, 1977.

The Office of the Solicitor, Department of the Interior, on behalf of Survey, has filed with the Board a motion to remand this case in order that the Director may entertain the motion for reconsideration and the motion to supplement the decision. The Solicitor asserts that resolution of the matters raised in these motions may eliminate the need for appeal to the Board or modify the grounds of the Director's decision.

[1] Generally, Survey may reconsider and modify or revoke its own decision in the absence of an appeal to this Board. However, the filing of an appeal to the Board removes the matter from the jurisdiction of Survey pending disposition of the appeal. See California Association of Four-Wheel Drive Club, 38 IBLA 361, 366, (1978); John J. Sexton (On Reconsideration), 20 IBLA 187, 192 (1975); Utah Power and Light Company, 14 IBLA 372, 373 (1974). Thus, Survey has no authority to decide these motions to reconsider, supplement, or modify its decision because a notice of appeal has been filed. If a party to

a decision or Survey itself wishes the Director to reconsider a decision after a notice of appeal has been filed, motion to remand the case should be filed with this Board, as has been done here.

The various motions of all parties in this case suggest that it is appropriate for the Director to consider the matter further. The motions made by Shell and Sun after issuance of the decision under appeal raise new issues which were not resolved in that decision. We believe such issues should appropriately better be first addressed by Survey. Moreover, remanding the case to the Director should allay Sun's doubt about the procedural fairness of using certain evidence as a basis for the Director's decision. Sun will have an opportunity to review and comment upon the evidence upon which the Director's decision will be based. Furthermore, we note that the Solicitor's Office has suggested that reconsideration by the Director may obviate the need for further action by this Board. In the event of any future appeal, however, the Director's decision should delineate all appropriate issues, including any new issues presented to him, after the parties have had an opportunity to address those issues fully.

[2] In the voluminous pleadings submitted to the Board, the issue of most immediate concern to the parties is whether the unitization order should be stayed pending further action by the Department. Shell wishes for the unitization orders to be put into effect immediately; Sun opposes this. To understand the concerns of the two companies, it is necessary to describe briefly the effect of the unitization orders.

The leases held by Sun and Shell cover a common natural gas pool on the outer continental shelf (OCS). In Survey's view, the pattern of wells on those tracts is already sufficient for adequate recovery of natural gas from the pool, and any additional wells would not be necessary and therefore inconsistent with protection of all the resources of the outer continental shelf. Shell and Survey believe Sun is obtaining a disproportionate share of production from the common pool. Shell contends it did not drill additional wells because unitization was pending and approval of the unitization is necessary to assure that Shell gets a proper share of production from the field. Nevertheless, Sun maintains that another well would not have been profitable for Shell, and that if it were not economically feasible for Shell to drill another well, there would be no need for the Department to compel unitization to protect OCS resources.

In arguing for a stay, Sun argues, inter alia, that implementation of the order will disrupt its existing relationships with its customers unnecessarily. Even if the unitization is upheld, Sun argues that Shell may be made whole by receipt of the cash value of prior production. On the other hand, Shell asserts that it is likely it will prevail on the merits, and argues that a stay order would allow Sun to sell each day $14,000 worth of gas which has been allocated to Shell.

Departmental regulation 30 CFR 250.81 provides in part as follows:

> Orders or decisions issued under the regulations in this part may be appealed as provided in part 290 of this chapter. Compliance with any such order or decision shall not be suspended by reason of any appeal having been taken unless such suspension is authorized in writing by the Director or the Board of Land Appeals (depending upon the official before whom the appeal is pending) . . . .

The Board of Land Appeals may thus suspend an order pending its consideration of an appeal, it may issue a stay in a case which has been appealed to the Board and remanded to the Director of U.S. Geological Survey, or in remanding a case, the Board may provide that the Director can determine whether or not a stay should be issued.

Reference has been made to court decisions setting forth the standards appellate Federal courts use in determining whether to stay the implementation of a lower court decision, especially where injunctive relief has been ordered. The leading case is Virginia Petroleum Jobbers Ass'n v. Federal Power Com'n, 259 F.2d 921 (D.C. Cir. 1958), where, at 925, the court listed four criteria to be considered:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review.
>
> (2) Has the petitioner shown that without such relief, it will be irreparably injured. . . . Mere injuries, however, substantial, in terms of money, time and energy necessarily expended in absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. But injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits.
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> (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? On this side of the coin, we must determine whether, despite showings of probable success and irreparable injury on the part of petitioner, the issuance of stay would have a serious adverse effect on other interested persons. Relief saving one claimant from irreparable injury, at the expense of

> similar harm caused another, might not qualify as the equitable judgment that a stay represents.
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> (4) Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes. . . . [The numbers are in the original quotation, but the criteria are not set forth as separate paragraphs as has been done above for emphasis.]

The United States Court of Appeals for the District of Columbia Circuit subsequently has emphasized that a court is not required to find that the ultimate success of the moving party is a mathematical probability under the first factor quoted above, but may grant a stay based upon its findings "governed by the balance of equities as revealed through an examination of the other three factors." Washington Metropolitan Area Transit Comm. v. Holiday Tours, 559 F.2d 841, 844 (1977). The emphasis is to weigh the equities of all effected parties, including the impact and effect upon the public. There may be differences between judicial and administrative concepts involving proceedings in the separate tribunals, such as between concepts of judicial and administrative standing. See Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied, 99 S. Ct. 733 (1979). This does not mean that an administrative body, in the absence of statutory mandates, must look to judicial rules for guidance, or must formulate its own criteria by regulation. Id. However, an agency may, sua sponte, follow judicial criteria. Here there are no regulatory criteria giving guidance as to the factors critical in determining whether to grant or deny a stay. The regulation quoted above pertaining to actions by Survey officials simply provides that an appeal does not effectuate a stay of an order or decision of the Survey official unless a specific order is made to that effect.

The criteria quoted above from the court, however, set forth appropriate factors to be used in a determination, and may serve as a guideline for this Department in the absence of statutory or regulatory criteria. In considering the public interest factor, however, the nature of the administrative process, as compared with judicial proceedings, may add further considerations. For example, there are differences between the authority of this Department and the Courts in enforcing orders, and in many other respects. These differences may also be weighed in a balancing of the equities necessary to effectuate an appropriate order.

A difference is illustrated here because of Survey's request for a remand of the case to consider the case further. The request suggests that there may be changes made in Survey's decision. This type

of procedure would not normally arise in court proceedings. In view of this request, we do not believe that it is appropriate for us to order implementation of the decision at this time. To do so would create administrative difficulties in the face of Survey's request which suggests that the decision will be changed or modified in some respect. This consideration must outweigh the other equities involved here. In these circumstances, it is better for Survey in its reconsideration to weigh the factors and make its determination first. Therefore, we shall stay the implementation of the decision unless and until the Director provides otherwise upon his assumption of jurisdiction of this case on remand.

In a request for discovery, Sun has asked Shell to produce certain documents. Shell has responded that Departmental regulation 43 CFR 4.423 provides only for issuance of subpoenas for the purpose of obtaining testimony at hearings. We do not consider it necessary to address the issues raised by Sun's request. The need for such information and its relevance can only be determined after the relevant issues have been delineated by the Director upon remand. If a further appeal is taken and it appears that there is an issue of fact about which the parties disagree, they may request a hearing at which both parties may present evidence on the issue. However, at this time, the need for such a proceeding is only conjectural. Sun has also requested an oral argument before this Board. In view of our disposition of this case, the request is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside, and the case is remanded to the Director of U.S. Geological Survey for further consideration. It is further ordered that the implementation of the unitization order is suspended until the Director himself issues an order otherwise. This is without future prejudice for any party adversely affected by a future decision of the Director in this matter to appeal to this Board pursuant to 30 CFR 250.81, 30 CFR Part 290; and 43 CFR Part 4.

Joan B. Thompson
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Douglas E. Henriques
Administrative Judge